Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
Petition of US West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket No. 98-147, 96-98, 98-141
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket Nos. 98-149
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

COMMENTS OF MPOWER COMMUNICATIONS CORP. ON NPRM REGARDING SPECIAL ACCESS PERFORMANCE MEASURES & STANDARDS

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Summary

Mpower believes that establishing measures and standards for special access would assist the Commission in accomplishing several goals, including 1) ensuring just, reasonable and nondiscriminatory provisioning and repair of special access; 2) providing a vehicle for comparison with and transition from UNEs; and 3) assistance in measuring the state of competition. Having national measures and standards for special access is of even greater importance given the "10% rule," which causes lines which might otherwise be intrastate to be tariffed at the federal level and to be interstate for regulatory purposes if at least 10% of the relevant traffic is interstate.

Mpower does not believe that special access is competitive. In fact, certain UNEs and special access are functionally equivalent. They are used interchangeably and are provisioned over the same lines with the same equipment. Further, pricing flexibility is not an adequate indicator of true competition, let alone of competitive impact. Phase I pricing relief does not even purport to represent a free market environment. ILECs receiving pricing relief for special access are allowed to offer term and volume discounts and may offer contract tariffs, however, they remain subject to some price cap rules, as well as tariff requirements.

Broadband is not competitive and if the country wants competitive broadband, as opposed to a monopoly or duopoly, the country needs CLECs. CLECs, in turn, need special access to compete and the development of a competitive marketplace would benefit significantly from measures and standards for special access.

In order to make a meaningful transition to competition, it is important for CLECs to have guaranteed access to needed products. This requires an ability to make

comparisons and to have guaranteed, minimum and enforceable standards. Measures and standards allow all parties to know that access is assured in a manner comparable to the more regulated UNEs. That will give the parties freedom to discuss competitive pricing and to be certain the pricing is the only item under discussion, rather than tied products or other manipulation that can effectively block access.

While most states do not have measures and standards in place for special access – perhaps, in part, because special access tends to be viewed as a federal issue – they do have UNE performance measures and standards for DS-1s and DS-3s which can be used for special access DS-1s and DS-3s. This would give all parties comparable information on identical – or virtually identical -- services and would provide guarantees that CLECs would receive comparable service during any transition period from UNEs to a more competitive environment.

As Mpower has said in other recent filings, industry leadership is needed to derive effective industry-wide solutions to problems. Solutions to problems will allow the industry to flourish and will also give the industry an opportunity to turn its attention to competing with other forms of communications structures, such as cable.

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COMMENTS OF
MPOWER COMMUNICATIONS CORP.
ON NPRM REGARDING SPECIAL ACCESS
PERFORMANCE MEASURES & STANDARDS

Mpower Communications Corp. ("Mpower") hereby submits its Comments on the issues raised by the Federal Communications Commission (“Commission” or “FCC”) in its Notice of Proposed Rulemaking (“NPRM”) on special access performance measures and standards.

I. Introduction

Mpower believes that establishing measures and standards for special access would assist the Commission in accomplishing several goals, including 1) ensuring just, reasonable and nondiscriminatory provisioning of special access; 2) providing a vehicle for comparison with and transition from UNEs; and 3) assistance in measuring the state of competition. Measures and standards should also apply to repair and maintenance. Having national measures and standards for special access is of even greater importance given the “10% rule,” which causes lines which might otherwise be intrastate to be tariffed at the federal level and to be interstate for regulatory purposes if at least 10% of the relevant traffic is interstate.

State-developed performance measures and standards for unbundled network elements (“UNEs”) are readily available. UNE measures and standards cover the circumstances of special access, e.g. DS-1s and/or DS-3s, and the same measures and standards used for UNEs can easily be adopted for special access. This would both facilitate their development and provide a greater measure of comparability. Thus, the main issues are whether this should be done and selection of the desired measures and standards.

There have been an increasing number of complaints about ILEC treatment of CLECs buying special access. Performance measures and standards should avoid many

of these complaints and, in effect, operate as a self-effectuating complaint resolution process. Certainly, setting clear measures and standards and specific "incentives" for failure to perform should speed the resolution of disagreements over provisioning, maintenance and repair of special access lines. As "incentives," Mpower prefers non-monetary requirements which "cure" the problem, e.g. requiring a "truck roll" in a subsequent month if certain measures are failed in a previous month, instead of punitive assessments which can just become a cost of doing business. Periodic review is almost always appropriate, perhaps on a 3-year cycle. Measures and standards should not be discontinued, however, until there is good evidence that sufficient competition exits.

II. Special Access in Not Competitive

Although ILECs are likely to assert that special access is competitive, CLECs, including Mpower, see no compelling evidence that this is so. Their experience, in fact, is that special access is not competitive. Certain UNEs and special access are functionally equivalent. From an equipment standpoint, they are interchangeable. They are provisioned over the same lines and with the same equipment. When UNEs are not available or are not immediately available, CLECs frequently substitute special access in order to be able to serve their customers. Some CLECs, in fact, have complained that they feel pushed into ordering the more expensive special access product because of the poor provisioning, long delays and inadequate repair and maintenance of UNEs only to encounter similar problems with special access.

As noted above, an increasing number of complaints are being filed outlining the inadequate performance of special access lines. If special access were really competitive,

companies might complain but they would move to a better company and solve the problem. That just isn't happening. The reason is that there are not a lot of choices.

While the ILECs will point to the FCC's grant of some pricing flexibility for special access as substantiating the existence of competition, pricing flexibility is not an adequate indicator of true competition, let alone of competitive impact. In fact, the FCC's decision to offer pricing flexibility for access services, based upon the amount of collocation, was appealed and ultimately, decided by the U.S. Court of Appeals for the District of Columbia in WorldCom v. FCC , 238 F.3d 449 (2001). The Court laid out the facts and rules fairly carefully. While the Court upheld the FCC, it clearly outlined the limitations of the underlying support for flexible pricing. It pointed out, for example, that for Phase I relief, the ILEC had to show collocation in only 15% of wire centers within an MSA[1] and that "at least one competitor… rel[ies] on transport facilities provided by a non-incumbent LEC in each wire center relied on."[2] [Emphasis added.] These are fairly minimal standards. To argue that they are sufficient to identify a competitive marketplace is just not credible.

In addition, Phase I pricing relief does not purport to represent an uncontrolled or free market. With Phase I pricing relief, ILECs "may offer contract tariffs and volume and term discounts, while remaining subject to some price cap rules and tariff requirements."[3] Also, the Phase I relief, based on the percent of collocation, applied only to dedicated transport services.[4] Other and much higher criteria apply to channel

[1] In the alternative, an ILEC could use wire centers accounting for at least 30% of revenues, which in this highly concentrated market could be even less than 15% of the wire centers.
[2] WorldCom v. FCC , 238 F.3d 449, 455-56 (2001)
[3] Id. at 455.
[4] Id.

terminations or common line and traffic-sensitive services.[5] Also, the measures used for pricing flexibility are fairly restrictive geographically, further undercutting any argument that special access services are generally competitive.

In its recent Broadband NPRM, [6] the Commission stated that:

> [W]e seek comment on whether incumbent LECs possess market power with respect to certain inputs such as special access services, which they could use to raise rivals' costs in certain broadband service markets where these inputs are critical to a firm's ability to provision the particular broadband service to end user customers.[7]

As noted above, Mpower believes ILECs have significant market power in the special access arena. ILECs, while asserting the competitiveness of special access and broadband more generally, implicitly admit that they have considerable market power in these areas when they assert that although broadband is needed, they will not make the investment to provide it unless they are given more regulatory flexibility. Only monopoly or dominant players can effectively threaten to withhold their services or facilities in order to pressure others to meet their demands.

These facts were reinforced by a January 18, 2002, article on the front page of the *Wall Street Journal*,[8] on lobbying for support of broadband roll-out, which characterized the state of broadband as follows:

> Broadband is now largely controlled by two oligopolies: the cable industry, which delivers service through cable modems; and the Baby Bells, which use digital subscriber lines, otherwise known as DSL. With their smaller competitors failing, both boosted their prices sharply last summer to around $50 a month from around $40, further slowing the pace of new subscriptions. Today, fewer than 10 million American households and businesses have high-speed Internet access.

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[5] Id. at 456.
[6] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Rel. 12/20/01.
[7] *Id.* at ¶ 29.
[8] *Wall Street Journal*, "Plugging In: Tech Lobbyists Seek Bonanza in New Push for Speedy Internet," 1/18/2002.

* * *

> But high-tech and telecommunications firms have differed sharply on how to bring about an increase in broadband deployment. For the Bells, the broadband strategy has become entangled in an extremely controversial effort to roll back provisions of the landmark 1996 Telecommunications Act. That law allows the Bells to sell long-distance phone and data service, but only after they've opened their local markets — the so-called "last mile" of phone service -- to competition….
>
> A … proposal, known as the Tauzin-Dingell bill, would allow the Bells to carry the voice and data traffic without having to prove that their local markets are open to competition. The bill is ardently opposed by the cable industry, long-distance companies like AT&T Corp., and the Bell's few remaining local competitors. These local players believe that bill would allow the Bells to cement their dominance over the DSL market while quashing any chance of competition in the local phone market.

Why is this true and how does this relate to the need for measures and standards for special access? It is <u>crucial</u> to remember that today's technology can make "narrow-band" copper loops into "broadband," i.e. DSL, and that fiber, i.e. broadband, carries voice traffic over much of the network. Therefore, CLECs need access to ILEC networks. Period. With access to ILEC networks, they have the needed ability to use either copper or fiber, as required, to connect their products to their customers. Special access, like some UNEs, is an important means of connecting CLEC customers to ILEC networks and providing access to broadband capacity.

As clearly outlined in the *Wall Street Journal* article above, broadband is presently controlled by two oligopolies, cable and ILECs. Unless CLECs are guaranteed continued access to ILEC networks, neither broadband nor local phone service will ever be competitive and ILECs will be able to use their cited "dominance over the DSL market" to their own advantage rather than to the public's advantage. In this regard, it should be noted that DSL is <u>not</u> a newly developed technology. It has existed for many

years. Only after CLECs began to enter the marketplace to sell DSL did the ILECs respond in kind.

Without measures and standards for special access, as explained further below, there will be no guarantees of CLEC ability to provide broadband and no ready means of transition to a more competitive marketplace. As noted in the *Wall Street Journal* article, broadband is controlled by two oligopolies. This means intra-modal or telecommunications services are dominated by the Bells, whereas inter-modal services are a duopoly. Without CLECs, there is no real competition at all.

Thus, if competitive broadband is a desired goal, CLECs are required to avoid monopoly or duopoly. CLECs, in turn, need special access to compete and the development of a competitive marketplace would benefit significantly from measures and standards for special access.

III. Right to Access is Important During Transition to Competition

In order to assure just, reasonable and non-discriminatory access to the functions available through special access, it is valuable to measure performance and to have enforceable standards. Mpower believes this will be especially important as the industry begins to make a transition from UNEs to competition.

Mpower sees three stages on the road to competition. The first stage is occupied by UNEs and relatively complete regulation of the relationship between ILECs and CLECs, including regulated, TELRIC pricing. The second stage is a phase of meaningful transition from UNEs to competitive products and the third stage is relatively unfettered competition.

In order to make a meaningful transition, it is important for CLECs to have guaranteed access to needed products. To be assured that CLECs are able to obtain access, there must be a way to assure CLECs are receiving what they are entitled to receive. This requires an ability to make comparisons and to have guaranteed, minimum standards. Standards should be enforceable, via self-effectuating non-monetary penalties that "cure" the problems rather than try to punish, e.g. requiring a "truck roll" in a subsequent month if certain measures are missed the preceding month. More specifically, if an ILEC misses a provisioning measure such as "troubles during installation" in one month, they could be required to dispatch a technician for loop trouble reports for the next month. Similarly, if an ILEC misses a measure relating to lack of appropriate facilities in one month, it could be required to pre-qualify or "pre-field" facilities for the next month.

Special access is functionally equivalent to some UNEs. To move away from UNEs, it is necessary to assure that CLECs will have access to products that have been guaranteed to them as UNEs. Instituting measures and standards is a good way to facilitate the transition to competition. Not only does it facilitate comparison between UNEs and allegedly more competitive products but typically, more competitive telecommunications providers, e.g. long distance carriers, offer minimum quality standards in their wholesale contracts. Thus, using guaranteed measures and standards mirrors the competitive marketplace we seek to achieve and putting them in place now can facilitate a smooth transition.

Also, the tying of products and the manipulation and abuse of pricing can effectively block access, especially when the basic product is not carefully identified and access to it is not guaranteed. Measures and standards should prevent such tactics.

Clear identification of products such as special access can allow CLECs to know they can obtain access to DS-1 and DS-3 products without the tying of other products. Then ILEC decisions regarding pricing will be independent of product definition. Measures and standards allow all parties to know that access is assured in a manner comparable to the more regulated UNEs. That will give the parties freedom to discuss competitive pricing and to be certain the pricing is the only item under discussion.

The need for such guarantees is great. The most recent example we are aware of is a reverse variation on the problem. Mpower bought special access from one of the ILECs prior to UNEs being available to us. When we wanted the ILEC to transfer Mpower from special access to UNEs, we wanted a simple billing change. We wanted exactly the same service over exactly the same lines, with exactly the same equipment. From the ILEC, Mpower received several years of colossal foot-dragging. Enormous "conversion management fee" payments were demanded and the ILEC refused to guarantee that our customers would not suffer significant outages!

The same scenario is quite possible in reverse if UNEs eventually are phased out and there are no measurements and no standards regarding basic services to which CLECs are entitled. Like the ILEC in the incident above, ILECs could propose to disconnect all the CLEC's lines, charge them an enormous "management fee" for the change, cause the change to take months and months and potentially cause many of the

CLEC's customers to suffer lengthy service outages when all that might be required is a billing change.

Ultimately, if a competitive market develops, neither the basic right to access nor its pricing will need to be mandated. Companies will vie to provide customer access and prices will be held in check by competition. New and more valuable products will be developed and companies will be able to choose what is most valuable to them. Until that time, however, measures and standards will provide some guarantee of access, provisioning time frames and quality, along with time frames and quality of repair and maintenance.

IV. Measures and Standards

In the UNE performance measures docket, the FCC has proposed about a dozen basic measures. As Mpower has argued in that proceeding, the FCC has chosen these measures carefully. They represent "core" measures which, along with a measurement of "percent due dates missed due to lack of facilities," are some of the most significant measures in place in the states. These same core measures can be applied to special access as well. This will both facilitate ease of development of measures and standards and will provide needed comparability.

Also, as Mpower has argued in the UNE performance measures docket, the process of developing and implementing measures and standards is well advanced in the states. Attached here and to Mpower's Comments in the UNE performance measures docket are the most similar Nevada measures and standards, including the additional measure for "percent due dates missed due to lack of facilities." Those Nevada standards

illustrate several significant points. 1) Detailed, comparable measures and standards exist in Nevada and many other states. 2) The FCC has chosen "core" measures, which have been thoroughly developed, tested and implemented in a number of states. 3) The states have "ready-made" measures and standards available for the choosing, including audit and other requirements as well.

While most states do not have measures and standards in place for special access – perhaps, in part, because special access tends to be viewed as a federal issue – they do have UNE performance measures and standards for DS-1s and DS-3s which can be used for special access DS-1s and DS-3s. As discussed above, this would give all parties comparable information on virtually identical services. It would also provide some guarantee that CLECs would receive comparable service during any transition period from UNEs to a more competitive environment.

Many CLECs now argue that special access is not provided in an effective and non-discriminatory manner. To the extent that special access is not provided in a just, reasonable and non-discriminatory manner, this would be identified and could be changed. While this would temporarily increase regulation incrementally, it should provide a sound basis for a transition to a more competitive environment for these products.

V. Industry Leadership Needed -- Still

It seems clear that the ILECs made a deal which resulted in the Telecommunications Act of 1996 ("1996 Act"). The deal was that if the 1996 Act was passed and competition flourished, gradual de-regulation would be allowed for ILEC operations. Apparently not satisfied with their deal, from day one, ILECs have

attempted, at every turn, to thwart competition operationally. At the same time, they have consistently and continually attacked any regulations which might facilitate the development of competition and have sought new laws which would by-pass the regulatory process. Nevertheless, ILECs are heard loudly declaring that competition exists and that they are entitled to near total de-regulation of their still dominant businesses.

Given such behavior, it is no great surprise that ILECs have not taken the lead in trying to solve industry-wide problems or in trying to move the industry forward toward competition and a win-win-win situation for ILECs, CLECs and customers. It is clear to Mpower, however, that such leadership is badly needed and of potentially great value to the entire industry.

If the industry – ILECs, CLECs and IXCs – made a serious effort, there is no reason to think it could not develop solutions to fundamental issues such as network access and a transition from UNEs to competition. Many of the "pieces" exist already and have been tried in some forum. Then, instead of spending the industry's scarce resources on a "war" where each side disputes each possible issue, competition could move forward within the industry, productivity in the industry would increase markedly, many new jobs would be created and the industry's attention could be focused on actively competing with other forms of communications structures, such as cable.

What is needed to accomplish this are two things: 1) Leadership and 2) A willingness to lay down the "sword" and to take up serious thought and compromise. As long as one or more sectors of the industry think they can obtain a better solution for themselves from government, this will not happen. The incentives for industry solution

formation should be strong, however. CLECs are some of the ILECs' biggest customers. If big customers and big suppliers worked together, as is typically done in more competitive markets, everyone would win.

As Mpower has said in more than one recent filing, large industry associations, such as the USTA, are in the best position to exercise the much needed industry leadership. The USTA has even begun to position itself to include CLECs, IXCs and others within its membership. If the USTA, or another large industry association, has the vision to actually listen to these other segments of the industry and take their views into account in seeking industry-wide solutions -- as opposed to supporting the positions of a single segment of the industry -- the basis for industry problem solving would exist.

VI. Conclusions

Mpower believes the Commission should adopt federal special access performance measures and standards, building on the well-advanced efforts and experience with UNE performance measures and standards in the states. There should be "incentives" in the form of non-monetary penalties to assure comparable, non-discriminatory performance by the ILECs. Because special access measures and standards can be identical to selected UNE performance measures and standards, it is possible to move forward quickly and in tandem with UNE and special access performance measures and standards.

If the country wants competitive broadband, as opposed to a monopoly or duopoly, the country needs CLECs. CLECs, in turn, need special access to compete and the development of a competitive marketplace would benefit significantly from measures and standards for special access. Here, as elsewhere, industry leadership toward

constructive solutions could make all the difference between wasting resources and building an industry future.

Respectfully submitted,

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